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COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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CLERK

No. PD-

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
1/20/2021
DEANA WILLIAMSON, CLERK

DANIEL GARCIA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Bell County
No. 03-19-00375-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

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IDENTITY OF JUDGE, PARTIES, AND COUNSEL

- * The parties to the trial court's judgment are the State of Texas and Appellant, Daniel Garcia.
- * The trial judge was the Honorable Fancy Jezek, 426th District Court, Bell County, Texas.
- * Counsel for the State at trial was Thomas M. Seigman, 2025 Memory Lane, Suite 400, Harker Heights, Texas 76548.
- * Counsel for the State on appeal was John A. Kuchera, 210 N. 6th Street, Waco, Texas 76701.
- * Counsel for the State before the Court of Criminal Appeals is Stacey M. Soule, State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.
- * Counsel for Appellant at trial were Bob D. Odom and Anne M. Potts Jackson, P.O. Box 540, Belton, Texas 76513.
- * Counsel for Appellant on appeal were Bob D. Odom and Justin B. Smith, P.O. Box 540, Belton, Texas 76513.

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No. PD-

TO THE COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

DANIEL GARCIA,

Appellant

v.

THE STATE OF TEXAS,

Appellee

Appeal from Bell County
No. 03-19-00375-CR

* * * * *

STATE'S PETITION FOR DISCRETIONARY REVIEW

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A statutory scheme authorizes restitution payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam. When such restitution is ordered, an objection is required to preserve a subsequent appellate challenge to the scheme. No objection was lodged here, so Appellant procedurally defaulted his complaint.

Alternatively, contrary to the lower court's holding, the scheme compensates a sexual assault victim by directly assuming the cost of the exam so the victim can benefit from evidence collection and preservation. Additionally, the scheme qualifies as a valid reimbursement cost.

STATEMENT REGARDING ORAL ARGUMENT

The State does not request oral argument.

STATEMENT OF THE CASE

Appellant was convicted of aggravated sexual assault, sentenced to twelve years' imprisonment, and ordered to pay the Attorney General \$1,000 restitution for the victim's forensic sexual assault exam. 10 RR 35; 1 CR 44. The court of appeals struck the restitution order because it did not compensate the victim for her loss or injury. *Garcia v. State*, No. 03-19-00375-CR, 2020 WL 4462805, at *1-2 (Tex. App.—Austin July 21, 2020, *reh'g denied* Dec. 14, 2020) (not designated for publication).

STATEMENT OF PROCEDURAL HISTORY

The court of appeals struck the restitution order. *Id.* The State's petition is due by January 13, 2021, because the State's motion for rehearing was overruled on December 14, 2020.¹

¹ <http://www.search.txcourts.gov/Case.aspx?cn=03-19-00375-CR&coa=coa03>.

GROUNDS FOR REVIEW

1. **Is an objection required to preserve a challenge to restitution ordered payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam?**
2. **Alternatively, does a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam qualify as victim compensation?**
3. **Alternatively, is a restitution order payable to the Attorney General for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam a proper reimbursement cost?**

ARGUMENT

1. **Background: Restitution for a crime-victim-fund payment made on behalf of a sexual assault victim for a forensic medical exam.**

When Appellant committed the sexual-assault offense on December 6, 2018,

1 CR 44, TEX. CODE CRIM. PROC. art. 42.037(a) stated, in part:

In addition to any fine authorized by law, the court that sentences a defendant convicted of an offense may order the defendant to make restitution to any victim of the offense or *to the compensation to victims of crime fund established under Subchapter B, Chapter 56*, to the extent that fund has paid compensation to or *on behalf of the victim*.

(emphasis added). Additionally, per Article 42.037(b)(2): “If the offense results in personal injury to a victim, the court may order the defendant to make restitution to:

. . . (B) the compensation to victims of crime fund to the extent that fund has paid compensation to or *on behalf of the victim*.” (emphasis added).

In Subchapter B of Chapter 56, Article 56.54(k)(1)² authorized the Attorney General to use the crime-victim’s fund to “reimburse a law enforcement agency for the reasonable costs of a *forensic medical examination* that are incurred by the agency under Article 56.06[.]”³ (emphasis added). TEX. CODE CRIM. PROC. art. 56.06(b) permitted law enforcement “to request a forensic medical examination of a victim of an alleged sexual assault as considered appropriate by the agency.” Under TEX. CODE CRIM. PROC. art. 56.06(c), the law enforcement agency that requested a forensic exam “for use in the investigation or prosecution of the offense” was required to pay all the costs.⁴ In turn, that agency was entitled to reimbursement for reasonable costs from the Attorney General.⁵ *Id.*

In this case, at punishment, the trial court imposed a \$1,000 restitution order

² This provision is now codified in TEX. CODE CRIM. PROC. art. 56B.453(d).

³ Before updated amendments, TEX. HEALTH & SAFETY CODE § 323.004 stated, in part:

(b) A health care facility providing care to a sexual assault survivor shall provide the survivor with: (1) subject to Subsection (b-1), a forensic medical examination in accordance with Subchapter B, Chapter 420, Government Code, if the examination has been requested by a law enforcement agency under Article 56.06, Code of Criminal Procedure, or is conducted under Article 56.065, Code of Criminal Procedure[.]

⁴ Subchapter F of Chapter 56A of the Code of Criminal Procedure now governs forensic testing for sexual assault victims. Acts 2019, 86th Leg., ch. 469 (H.B. 4173), § 1.05, eff. Jan. 1, 2021.

⁵ This provision is now codified in TEX. CODE CRIM. PROC. art. 56A.252.

payable to the Attorney General for the victim's sexual assault exam.⁶ 10 RR 35 ("I'll also order that you pay \$1,000 to the office of the attorney general as restitution in this case."); 1 CR 44 (judgment). The Attorney General had reimbursed the Bell County District Attorney's Office for the victim's sexual assault exam. Sealed 1 Supp. CR 71 (Sealed PSI Victim Impact Statement). Appellant did not object to the in-court assessment of the restitution when the judge asked if there was any reason why the sentence should not be imposed. 10 RR 35.

2. The Court of Appeals' erroneous striking of the restitution.

The Austin Court of Appeals held that the \$1,000 restitution order was improper, according to the statutory scheme, because it did not compensate the victim for a loss or injury or a party who compensated the victim for a loss or injury. *Garcia*, 2020 WL 4462805, at *1-2. It remarked, "There was no testimony or other evidence that the victim either paid or was responsible for paying for any part of the cost of the examination conducted by the sexual assault nurse examiner or that the victim incurred any costs associated with the exam." *Id.* at *2. Because the trial judge was not authorized to impose the order, the court deleted it from the judgment.

⁶ Article 56.06 applied in this case because the assault was reported to law enforcement before the exam. 6 RR 41. TEX. CODE CRIM. PROC. art. 56.065 provided a similar scheme for reimbursement by health care facilities themselves for cases in which the assault had not been reported before the exam.

Id.

3. Appellant’s challenge to the propriety of the restitution order was procedurally defaulted.

Because Appellant challenged the propriety of the restitution, payable to the Attorney General, based on the applicable statutory scheme⁷—not its factual basis (*i.e.*, the amount or fact the exam was given and paid for)—he was required to object. *See Idowu v. State*, 73 S.W.3d 918, 923 (Tex. Crim. App. 2002) (“appellant did not preserve any purported error in the accuracy of the restitution order, because he failed to make a specific complaint in the trial court at the time that order was imposed.”). Appellant did not object when the trial court ordered it at sentencing; in fact, he affirmatively stated he had no objection. 10 RR 35. As a result, the court of appeals erred when it failed to address preservation before ruling on the merits of his claim.⁸

⁷ Appellant’s own framing of his ground addresses the statutory authority, including the Legislature’s definition of victim. Appellant Court of Appeals’ Brief, at 5 (“The Office of the Attorney General is not a victim . . . [so] the district court had no authority to order restitution to the Office of the Attorney General”) (internal citations omitted).

⁸ The State raised forfeiture for the first time in its motion for rehearing; however, the court of appeals overruled the motion. The State did not forfeit any preservation complaint because it is a systemic requirement and a first-tier appellate court must consider it before reversing a trial court’s judgment. *See Darcy v. State*, 488 S.W.3d 325, 327-28 (Tex. Crim. App. 2016) (“The systemic nature of the requirement means that a first-tier appellate court may not *reverse* a judgment of conviction without first addressing any issue of error preservation.”) (citations omitted) (emphasis added).

This Court should reverse the lower court because Appellant procedurally defaulted his complaint even though he had the opportunity to object. *See Burt v. State*, 396 S.W.3d 574, 577-78 (Tex. Crim. App. 2013) (“An appellant fails to preserve error by failing to object when he had the opportunity[.]”).

4. Alternatively, restitution to the Attorney General for the cost of the victim’s forensic sexual assault exam qualified as victim compensation.

The court of appeals failed to take the Legislature at its word when it refused to abide by the plain text of the statutory scheme. The lower court should have acknowledged that, implicit within the phrase “on behalf of a victim,” is the victim’s indisputable status as a beneficiary of the forensic sexual assault exam. TEX. CODE CRIM. PROC. art. 42.037(a), (b)(2). It is the victim of sexual assault⁹ who suffers a recognized physical and psychological harm. And a victim, like society in general, has a vested interest in seeing a perpetrator prosecuted and punished. *See, generally, Meadoux v. State*, 325 S.W.3d 189, 195 (Tex. Crim. App. 2010) (“Four goals of penal sanctions have been recognized as legitimate: retribution, deterrence, incapacitation, and rehabilitation.”); *see also* TEX. CODE CRIM. PROC. art. 56.311 (express legislative intent for crime-victim’s compensation fund). Forensic evidence is of great value—even crucial at times—to any sexual assault prosecution. Therefore, the

⁹ *See* TEX. CODE CRIM. PROC. art. 56.01(3) (“‘Victim’ means a person who is the victim of the offense of sexual assault . . . or who has suffered personal injury or death as a result of the criminal conduct of another.”).

Legislature balanced a victim's right to privacy and medical care with a victim's and society's interest in prosecution and punishment by having the State directly absorb the cost of the exam so a victim can have the benefit of forensic evidence collection and preservation. *See, generally*, TEX. CODE CRIM. PROC. art. 56.311 (there is a need to compensate victims who suffer personal because they may "incur financial burdens" and compensation "encourage[s] greater public cooperation in the successful apprehension and prosecution of criminals.").

The personal interests of sexual assault victims was clearly prioritized by the Legislature in the statutory scheme. First, the victim controlled access to any forensic evidence; the initiation of a forensic exam was contingent on victim consent. TEX. HEALTH & SAFETY CODE § 323.004(c); TEX. CODE CRIM. PROC. art. 56.06(b). So without the victim's cooperation, no evidence could be discovered or collected by a professional examiner. Further, in an apparent effort to reduce a victim's exposure to more trauma, the statutes contemplated that the forensic exam would be conducted at the same time that the victim would receive medical treatment. TEX. HEALTH & SAFETY CODE § 323.004(b).¹⁰ Finally, TEX. CODE CRIM. PROC. art. 56.021

¹⁰ TEX. HEALTH & SAFETY CODE § 323.004(b) stated: A health care facility providing care to a sexual assault survivor shall provide the survivor with:

(1) subject to Subsection (b-1), a forensic medical examination . . . if the examination has been requested by a law enforcement agency under Article 56.06, Code of Criminal Procedure, or is conducted under Article 56.065, Code of Criminal Procedure;

specifically granted rights to victims, which included, *inter alia*, the disclosure of the status of an analysis, notice of when a request for analysis is submitted, and the time a request for any biological evidence comparison is made and the results of any comparison. TEX. CODE CRIM. PROC. art. 56.021(a)(3)(A)-(C).

When sexual-assault-forensic services were provided under Chapter 323, Texas Health and Safety Code, then the victim received a direct benefit by having the evidence of the crime collected by a specialized examiner for proper preservation.¹¹ See TEX. GOV'T CODE §§ 420.003(5)-(6) (defining sexual assault examiner and nurse examiner), 420.031 (Attorney General must develop and distribute collection protocol and list requirements for evidence collection kit and preservation); TEX. HEALTH &

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- (2) a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;
 - (3) access to a sexual assault program advocate, if available, as provided by Article 56.045, Code of Criminal Procedure;
 - (4) the information form required by Section 323.005;
 - (5) a private treatment room, if available;
 - (6) if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and
 - (7) the name and telephone number of the nearest sexual assault crisis center.

¹¹ TEX. CODE CRIM. PROC. art. 56.06(a) and (b) were enacted with the intent to “insure that a victim of sexual assault has the ability to have their physical state evaluated and to preserve potential evidence of their alleged assault.” 2005 C.S.H.B. 544 Bill Analysis available at, <https://capitol.texas.gov/tlodocs/79R/analysis/pdf/HB00544H.pdf#navpanes=0>.

SAFETY CODE § 323.0045 (exam training required). The exam thus constituted a form of compensation for a victim for the loss and injury suffered. *See Hanna v. State*, 426 S.W.3d 87, 91 (Tex. Crim. App. 2014) (“Restitution serves multiple purposes, including restoring the victim to the status quo and forcing an offender to address and remedy the specific harm that he has caused”), 94 (“‘victim’ is any person who suffered loss as a direct result of the criminal offense.”).

The State merely acted as a third-party facilitator—like a health-care insurance company—that assumed a specific financial responsibility for a service provided for the victim as a result of the offense. *See id.* at 93 (“‘a restitution order is limited to only the losses or expenses that the victim or victims suffered as a result of the offense for which the defendant was convicted.’”) (quoting *Cabla v. State*, 6 S.W.3d 543, 546 (Tex. Crim. App. 1999)), 97 (restitution proper for unnamed victim for which the defendant’s conduct was a “but for” cause). If a victim’s insurance company paid a claim for the exam or evidence collection on the victim’s behalf, the victim’s insurance company would have been entitled to restitution. *See, e.g., Narvaez v. State*, 40 S.W.3d 729, 730 (Tex. App.—San Antonio 2001, pet. dismissed) (restitution to medical facility that treated the victim’s injuries); *Jones v. State*, 713 S.W.2d 796, 797 (Tex. App.—Tyler 1986, no pet.) (restitution to an insurance company used to pay the victim’s medical bills); *Harrison v. State*, 713 S.W.2d 760,

765 (Tex. App.—Houston [14th Dist.] 1986, pet. ref’d) (restitution to insurance company that paid victim’s hospital expenses; insurance company was a “victim” of the crime). The statutory scheme at issue here was no different and thus should be treated as the same.

The judiciary is not free to disregard the Legislature’s intent to provide funding on behalf of sexual assault victims for forensic exams and evidence collection. The striking down of statutory criminal restitution infringes on the Legislature’s constitutional authority to establish uniform costs, fees, and punishment and enact the State’s budget. *See* TEX. CONST. Art. III, §§ 46, 49a(b); *State v. Rhine*, 297 S.W.3d 301, 305-06 (Tex. Crim. App. 2009) (“The legislature also declares the public policy of the state and may depart from established public policy, reshape it, or reform it.”). Therefore, the court of appeals’ rejection of this compensation and restitution scheme for being unconnected to the victim violated separation of powers. *See Vandyke v. State*, 538 S.W.3d 561, 569 (Tex. Crim. App. 2017) (courts are “not empowered to substitute what [they] believe is right or fair for what the Legislature has written, even if the statute seems unwise or unfair.”).

Finally, even if restitution to the Attorney General does not comport with this Court’s precedent defining “victim” for purposes of restitution, shouldn’t the Legislature be entitled to define it? Yes. *See id.* As a consequence, the judicial

branch is prohibited from intruding into the Legislature’s power to set the parameters of entitlement to restitution. *See id.* As discussed above, the Legislature designated the Attorney General as a *de jure* victim when it covers the cost of a forensic medical exam for a sexual assault victim. TEX. CODE CRIM. PROC. arts. 56.01(3), 56.06, 56.54(k)(2). That determination should be upheld.

5. Alternatively, the Attorney General restitution order should be upheld as a valid reimbursement cost.

Even assuming that the Attorney-General-restitution provisions exceed this Court’s “victim” status eligibility requirement, the cost should be upheld as a legitimate reimbursement cost. This Court has determined that costs that “reimburse criminal justice expenses incurred in connection with the defendant’s particular criminal prosecution” are permissible. *Allen v. State*, __S.W.3d__, PD-1042-18, 2019 WL 6139077, at *6 (Tex. Crim. App. 2019). While the cost has been titled “restitution” as a matter of form, TEX. CODE CRIM. PROC. art. 42.037(a), (b)(2)(B), it operates to reimburse the State for money expended toward an investigation and prosecution. TEX. CODE CRIM. PROC. art. 56.06(c);¹² 10 RR 35; 1 CR 44. This Court

¹² Subsection (c) stated:

A law enforcement agency that requests a forensic medical examination of a victim of an alleged sexual assault *for use in the investigation or prosecution of the offense* shall pay all costs of the examination. On application to the attorney general, the law enforcement agency is entitled to be reimbursed for the reasonable costs of that examination if

should uphold the order here because of the purpose it served in reimbursing the State for Appellant’s prosecution. *See Allen*, 2019 WL 6139077, at *7 (“When a court-cost statute seeks to recoup expenses legitimately incurred in connection with the prosecution of a defendant’s criminal case, then the collection of such fees is a proper part of the judicial function[.]”).

the examination was performed by a physician or by a sexual assault examiner or sexual assault nurse examiner, as defined by Section 420.003, Government Code.
(emphasis added).

PRAYER FOR RELIEF

The State prays that the Court of Criminal Appeals grant this State's petition and reverse the court of appeals' decision striking the restitution order.

Respectfully submitted,

/s/ Stacey M. Soule
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to the WordPerfect word count tool this document contains 2,652 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Stacey M. Soule
State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the State's Petition for Discretionary Review has been served on January 11, 2021, *via* email or certified electronic service provider to:

Hon. Justin B. Smith
JustinBradford.Smith@bellcounty.texas.gov

Hon. John A. Kuchera
johnkuchera@210law.com

/s/ Stacey M. Soule
State Prosecuting Attorney

APPENDIX

(Court of Appeals' Opinion)

2020 WL 4462805
Only the Westlaw citation
is currently available.

SEE TX R RAP RULE 47.2
FOR DESIGNATION AND
SIGNING OF OPINIONS.

Do Not Publish
Court of Appeals of Texas, Austin.

Daniel GARCIA, Appellant
v.
The STATE of Texas, Appellee

NO. 03-19-00375-CR

|
Filed: July 21, 2020

**FROM THE 426TH DISTRICT COURT
OF BELL COUNTY, NO. 78676, THE
HONORABLE FANCY H. JEZEK, JUDGE
PRESIDING**

Attorneys and Law Firms

Bob D. Odom, Assistant District Attorney, P. O.
Box 540, Belton, TX 76513, for Appellee.

John A. Kuchera, 210 N. 6th St., Waco, TX
76701-1313, for Appellant.

Before Justices Goodwin, Kelly, and Smith

MEMORANDUM OPINION

Chari L. Kelly, Justice

*1 Daniel Garcia was convicted of the offense
of aggravated sexual assault and sentenced

to twelve years' imprisonment. *See* Tex. Pen.
Code § 22.021(a)(2)(B). The trial court ordered
Garcia to pay \$1,000 in restitution to the Office
of the Attorney General. On appeal, Garcia
challenges the propriety of the portion of
the trial court's judgment requiring restitution.
We will modify the trial court's judgment
to delete the restitution requirement and, as
modified, will affirm the trial court's judgment
of conviction.

We review challenges to restitution orders
under an abuse of discretion standard.
Cartwright v. State, 605 S.W.2d 287, 288-89
(Tex. Crim. App. 1980). In addition to any fine
authorized by law, the court that sentences a
defendant convicted of an offense may order
the defendant to make restitution to any “victim
of the offense.” Tex. Code Crim. Proc. art.
42.037(a). “[R]estitution is limited to victims
who have suffered harm to their person or
property as a result of the offense.” *Hanna
v. State*, 426 S.W.3d 87, 94 (Tex. Crim. App.
2014). Restitution can be ordered only for an
injury resulting from the offense charged and
can be made only to the victim, except when
“justice dictates payment be made to a person
or party who has compensated the victim for
the loss.” *Ceballos v. State*, 246 S.W.3d 369,
373 (Tex. App.—Austin 2008, pet. ref'd); *see
also Campbell v. State*, 5 S.W.3d 693, 697
(Tex. Crim. App. 1999) (“Another limit on the
authority of a trial court to order restitution is
that a trial court may not order restitution to any
but the victim or victims of the offense with
which the offender is charged.”).

In the present case, the trial court ordered
Garcia to pay \$1,000 in restitution to the
Office of the Attorney General to compensate

it for reimbursing the Bell County District Attorney's Office for the cost of a sexual assault nurse examiner's (SANE) examination of the victim. This does not constitute a payment to the victim to compensate her for her loss. Rather, it is a payment to the Office of the Attorney General to compensate it for reimbursing the Bell County District Attorney's Office, which paid for the victim's examination by a SANE. The Texas Code of Criminal Procedure provides that “a health care facility that provides a forensic medical examination to a sexual assault survivor [] or the sexual assault nurse examiner who conducts that examination [] is entitled to be reimbursed in an amount set by attorney general rule for [] (1) the reasonable costs of the forensic portion of that examination; and (2) the evidence collection kit.” Tex. Code Crim. Proc. art. 56.06(b-2). Such a payment is not one made to compensate the victim for her injury or loss and, consequently the trial lacked authority to order Garcia to pay for the cost of the forensic exam as restitution. *See Aguilar v. State*, 279 S.W.3d 350, 353 (Tex. App.—Austin 2007, no pet.) (trial court could not order defendant to pay lab fees for testing methamphetamines found in his possession as restitution).

***2** Relying on article 56.06(f) of the Texas Code of Criminal Procedure, the State argues that, to the extent that the examination was “expressly for the benefit and treatment of the victim that was made necessary, not by the investigation, but rather by the appellant as a result of the sexual assault,” the payment was a payment made “on behalf of” the victim. *See* Tex. Code Crim. Proc. art. 56.06(f) (“The attorney general may make a payment to or

on behalf of an individual for the reasonable costs incurred for medical care provided in accordance with Section 323.004, Health and Safety Code.”); Tex. Health & Safety Code § 323.004 (describing services to be provided to sexual assault survivor arriving at health care facility following alleged sexual assault). As previously stated, restitution may only be paid to the victim or to a person who has “compensated the victim for the loss.” *See Ceballos*, 246 S.W.3d at 373. There was no testimony or other evidence that the victim either paid or was responsible for paying for any part of the cost of the examination conducted by the sexual assault nurse examiner or that the victim incurred any costs associated with the exam. Thus, there was no evidence presented to the trial court that any payment made by either the Bell County District Attorney's Office or by the Office of the Attorney General was to compensate the victim for any loss.

Because the payment by the Office of the Attorney General did not compensate the victim for any loss or injury, the trial court abused its discretion by ordering Garcia to pay the Office of the Attorney General \$1,000 in restitution. We therefore modify the trial court's judgment of conviction to delete those portions of the judgment that order Garcia to pay \$1,000 in restitution to the Office of the Attorney General. *See Burt v. State*, 445 S.W.3d 752, 757 (Tex. Crim. App. 2014) (explaining that deletion of written restitution order is appropriate when trial judge does not have statutory authority to impose specific restitution order). As modified, we affirm the trial court's judgment.

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